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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NEVADA, ET AL,
Petitioner,
v.

HICKS, FLOYD, ET AL
Respondents

On Writ of Certiorari to the Ninth Circuit Court of Appeals

BRIEF OF COALITION FOR LOCAL SOVEREIGNTY SUPPORTING THE RESPONDENT

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Question Presented

Does the U.S. Constitution permit the federal courts to shield a defendant from civil trial in the vicinage of an alleged offense, by invoking immunity for government agents?

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INTEREST OF AMICUS CURIAE[1]

Coalition for Local Sovereignty is made up of state, local and tribal officials, as well as concerned citizens, working to uphold the principle of local self-government and community based decision making. As the only national organization dedicated exclusively to the restoration of local self-government, we possess a unique perspective on such cases.

Counsel to the petitioner, and counsels to the respondents, have consented to the filing of this *amicus* brief. Consent letters are on file with the Clerk of the Court.

SUMMARY

At root this case is about the ability of tribal governments to adjudicate disputes arising from actions occurring within a tribe's territorial jurisdiction.

This Court has ruled that the purpose of trial by jury is both "in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, *and* in the community participation and shared responsibility that results from that group's determination of guilt or innocence" *(Williams v Florida* (1970)). This understanding is basic in the common law understanding that a jury of the vicinage is the proper authority for adjudicating alleged offenses (whether civil or criminal) committed in the community.

The attempt by the State of Nevada, to use the federal courts to block the civil trial of individual state agents in tribal court, runs afoul of constitutional design and the common law. Nevada, in effect, asks this Court to adopt the ill advised 1774 "Intolerable Acts" as the law of the land, and make individual state agents unaccountable to local courts for acts they commit while within the tribe's jurisdiction, even while actually performing functions at the suffrage of the tribal government.

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[1] This brief was authored by counsel for Coalition for Local Sovereignty, no other person has made any monetary contribution for its preparation or submission.

This Court has also repeatedly ruled that to deny civil trial jurisdiction to tribal courts, even in disputes between Indians and non-Indians "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves"(Williams v. Lee (1959)).

ARGUMENT

I. Federal courts may not shield a defendant from trial in the vicinage of the alleged offense, by invoking immunity for government agents.

A. Art 3 of the US Constitution requires that trial by jury be interpreted not just as an individual right, but as a right of local communities to participate in the determination of offenses committed within those communities.

This Court has ruled repeatedly that the Article 3 requirement that 'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed" guarantees a right of the community to participate in the judgement of crimes.

The issues raised in this case take us back to fundamental common law rights which the American Founders fought to protect.

The claim that government officials might be held immune from prosecution by the local community was a major cause of the American Revolution, and the principle of government officials being responsible to the neighborhood, or vicinage[2], is a

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[2] "Vicinage" means neighborhood, and "vicinage of the jury" means jury of the neighborhood or, in medieval England, jury of the County. 4 W. Blackstone, Commentaries on the Laws of England *350-351 (T. Cooley 4th ed. 1899). See 3 J. Story, Commentaries on the Constitution of the United States 1775-85 (1833).

fundamental principle enshrined in the Declaration of Independence and the US Constitution.

In the winter of 1770, a group of British solders fired upon a crowd of Bostonians, in the incident which has ever since been know as the Boston Massacre. On March 13, the colony's attorney general issued 13 indictments for murder. The British soldiers were tried before the Superior Court of Judicature, the highest court in Massachusetts. The Justices of the court served at the pleasure of the Massachusetts legislature. The jurors were local colonists.

The British soldiers were acquitted of the worst charges, but the trial caused Parliament to pass two important measures: the Administration of Justice Act and the Massachusetts Government Act. The Administration of Justice Act declared that henceforth any English soldier charged with a crime could not be tried in the colonies but would return to Britain. The Massachusetts Government act vested all authority in the royal governor to appoint court officials, juries and sheriffs. These acts, revoking parts of charter of 1691, stripping away the power of the colonists to control the courts, and revoking all jurisdiction over British officials became known as the Intolerable Acts.

These acts caused tremendous resentment, and were a major contribution to the War. More importantly, however, were the legal principles involved, upon which the United States was founded. The Colonists not only believed that these acts destroyed self-government and placed British officials "above the law," but that the Administration of Justice Act was a flagrant violation of the common law principle of "vincinage."

As the distinguished Yale Constitutional scholar Akhil Reed Amar has described it, the common law required:

> a jury of the 'vicinage': one composed of citizens of the locality where the blood had spilled. The vicinage rule derived from the local community's right to self-government, a right to judge for itself, via the jury, what had happened and how to respond. . . . The basic idea of

jury trial in cases like the Boston Massacre, the Rodney King beating, and the Diallo killing is that the people directly affected by government officers should be the ones who judge them.

The First Continental Congress, called largely in response to the Intolerable Acts passed a resolution saying, "That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law" (1 Journals of the Continental Congress, 69).

These principles of self-government and the rule that officials must be *responsible to the community in which their actions are committed* were enshrined in both the Declaration of Independence and the U.S. Constitution.

The Declaration declared in its Bill of Particulars against the King:

> He has obstructed the Administration of Justice [a clear reference to the Administration of Justice Act], by refusing his assent to laws for establishing the Judiciary powers,
> – he has made judges dependent on his will alone for the tenure of their offices, and the amount and payment of their salaries . . .
> – he has affected to make the military independent of and superior to the civil power,
> – he has combined with others to subject us to a jurisdiction to a foreign to our constitution and unacknowledged by our laws; giving his assent to their acts of pretended legislation:
> – For quartering large bodies of armed troops among us:
> – For protecting them by a mock trial, from punishments for any murders they commit on the inhabitants of these States.

We certainly do not regard the actions of British soldiers and the Nevada officials in the current case as being in any way comparable by way of gravity, but we do believe that the principle at issue is the same. The principle is that outside officials who

come into a community and commit illegal acts attacking the lives, liberties or property of local citizens ought not, and may not legally, be shielded from the laws of that community.

In addition to the authority of the Declaration, however, more important is the fact that these concerns for the common law principle of the "jury of the vicinage" was incorporated in both Article 3 and the Sixth Amendment (and by implication the Seventh Amendment) of the U.S. Constitution. Article 3 declared that "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crime shall have been committed."

The wording here is very important. Article 3 does not say that a defendant has a "right to trial by jury," rather it declares that trial of all crimes "shall be by jury." This Court has noted repeatedly that this wording makes trial by jury more than simply a "right of the defendant" and the defendant may not unilaterally "waive" trial by jury. This Court ruled (Low v. United States (C. C. A.) 169 F. 86, 92; and Dickinson v. United States (C. C. A.) 159 F. 801. Patton v US (1930) 281 U.S. 276) that

> Undoubtedly, the accused has a right to waive everything which pertains to form and much which is of the structure of a trial. But he may not waive that which concerns both himself and the public, nor any matter which involves fundamentally the jurisdiction of the court. The jurisdiction of the court to pronounce a judgment or conviction for crime, when there has been a plea of not guilty, rests upon the foundation of a verdict by a jury. Without that basis the judgment is void.

Thus court has said clearly, and repeatedly that the Article 3 requirement that "trial shall be by jury" concerns rights of both the defendant "and the public."

Yet, many people in the early days, believed that Article 3 did not go far enough to ensure truly local jurisdiction. The desire to guarantee that crimes should be tried not just in the state but in

the vicinage, resulted in the more local language included in the Sixth Amendment that all crimes should be tried in both the "state and the district where they shall have been committed."

There can be no doubt that the words of the Sixth Amendment were not intended to diminish the jury as a means of self-government, but was simply intended to ensure that juries were drawn from the local neighborhood rather than from across the state. The Federal Farmer (either Richard Henry Lee or Melancton Smith), opens letter 2, for example, by stating that "The essential parts of a free government are a full and equal representation of the people in the legislature and the jury trial of the vicinage in the administration of justice." Many early American regarded the jury as on a par with representation in the legislature. The legislature was the representatives of the people making law, while the jury was the representatives of the people seeing that those laws were properly administered. (It is also important to note that here as elsewhere, proponents of what were to become the Sixth and Seventh Amendments made no distinction between civil and criminal trials with regard to the jury as a means of local self-government.)

It should be noted that while the Sixth Amendment does express this vicinage requirement as a privilege of the defendant this Court has repeatedly noted that this slightly different emphasis from Art 3 should be taken to deny the right of the community to participate via the jury. Notably in Patton v. US this court said:

> This provision, which deals with trial by jury clearly in terms of privilege, although occurring later than that in respect of jury trials contained in the original Constitution, is not to be regarded as modifying or altering the earlier provision [requiring trial by jury in all criminal cases]; and there is no reason for thinking such was within its purpose. The first ten amendments and the original Constitution were substantially contemporaneous and should be construed in pari materia. So construed, the latter provision fairly may be regarded as reflecting the meaning of the former. In other words, the two provisions mean substantially the same thing;

and this is the effect of the holding of this court in Callan v. Wilson, 127 U.S. 540, 549 , 8 S. Ct. 1301, 1303, where it is said:

> 'And we do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them.'

Rather than lessening the "rights of the community" Amendment 6 was adopted simply to ensure a more local jurisdiction than simply each state as a whole.

> Indeed, pending and after the adoption of the Constitution, fears were expressed that Article III's provision failed to preserve the common-law right to be tried by a "jury of the vicinage." That concern, as well as the concern to preserve the right to jury in civil as well as criminal cases, furnished part of the impetus for introducing amendments to the Constitution that ultimately resulted in the jury trial provisions of the Sixth and Seventh Amendments. *Williams v Florida* ([399 U.S. 78, 94] 1970)

When viewed in its proper historical context, the Sixth and Seventh Amendment (like Article 3) contains not just a right of individuals to be tried locally but also the right of communities to be the judge of offenses (real or imagined) committed therein.

This principle of community responsibility was enshrined in the Judiciary act of 1789, which required in section 29: "That in cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence."

The requirement that a jury must be selected from the vicinage, even when a trial could not be physically held in the county where an alleged crime was committed, clearly shows the first Congress's concern that determinations of crimes ought to be by representatives of the community against which the crime is

committed.

The early disputes over trial by jury clearly regarded jury trial in civil matters as basic to preserving liberty. As Alexander Hamilton noted in Federalist 83, "The objection to the plan of the convention, which has met with most success in this State, and perhaps in several of the other States, is that relative to the want of a constitutional provision for the trial by jury in civil cases." Hamilton went on to note that "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government."

Hamilton makes clear in Federalist 83 that while he regards trial by jury in criminal cases as far more important than in civil cases, his opponents regard them as equally necessary. The anti-federalists and federalist supporters of a Bill of Rights regarded trial by jury in civil cases as essential to the preservation of freedom and local self-government (see, for example, Federal Farmer letters 2 and 15). While the authority of Hamilton is assuredly great, on the matter of the Sixth and Seventh Amendments the views of its supporters who saw them as a buttress to "popular sovereignty" and who regarded jury trial in both criminal and civil cases as "the very palladium of free government"must take precedence.

Finally, as recently as 1970 this Court has explicitly acknowledged "community participation" is fundamental in the very purpose of a jury. In *Williams v. Florida* (399 U.S. 78) this Court declared "the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, ***and*** *in the community participation and shared responsibility that results from that group's determination of guilt or innocence*" [emphasis added]. The purpose of the jury is not just to preserve individual rights but to ensure "community participation and shared responsibility."

While some jurisprudence in recent years has tended to

assume that "a defendant's interest in a fundamentally fair trial outweighs the State's interest in holding that trial in a particular district." (J. Marshall dissent, Brecheen v. Oklahoma, 485 U.S. 909, 911 (1988)), never has this court denied that communities do possess an interest in holding trials in the local community, and even dissenters such as Justice Marshall have acknowledged that interest. In fact, in recent years this Court has repeatedly declined to expand the right to change of venue by a defendant in the direction suggested by JJ. Marshall and Brennan (Swindler v. Lockhart, 495 U.S. 911 (1990), Lee v. Georgia, 488 U.S. 879 (1988) denying cert.).

We think therefore, it is evident from history and precedents of this court that the community of the vicinage has a constitutionally protected right to participate in the judgement of civil or criminal offenses committed against that community.

B. Adjudication of civil offenses by local courts is necessary for the preservation of local self-government.

While the principle of trial by the vicinage primarily applies to criminal trials, the principle of community self-government which is ultimately at stake is the same whether a trial is criminal or civil. Moreover, this court has repeatedly held that jurisdiction over civil disputes is an integral part of sovereignty.

In 1959 (Williams v. Lee) reversing an Arizona decision saying that civil disputes between Indians and non-Indians should be resolved in state court rather than tribal court, a unanimous US Supreme Court declared

> There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves. It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took

> place there. Cf. Donnelly v. United States, supra; Williams v. United States, supra. The cases in this Court have consistently guarded the authority of Indian governments over their reservations. Congress recognized this authority in the Navajos in the Treaty of 1868, and has done so ever since.

The reasoning in Williams v. Lee applies equally well here. To deny the exercise of tribal jurisdiction in a suit between an Indian and a non-Indian over an action which occurred on tribal territory "would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves."

This Court has repeatedly upheld tribal civil jurisdiction over non-Indians. As recently as 1990 in Duro v. Reina (495 US 676) this Court declared:

> It is true that our decisions recognize broader retained tribal powers outside the criminal context. Tribal courts, for example, resolve civil disputes involving nonmembers, including non-Indians. See, e. g., Santa Clara Pueblo v. Martinez, 436 U.S. 49, 65 -66 (1978); Williams v. Lee, 358 U.S. 217, 223 (1959); F. Cohen, Handbook of Federal Indian Law 253 (1982 ed.) ("The development of principles governing civil jurisdiction in Indian country has been markedly different from the development of rules dealing with criminal jurisdiction"). Civil authority may also be present in areas such as zoning where the exercise of tribal authority is vital to the maintenance of tribal integrity and self-determination. See, e. g., Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, 492 U.S. 408 (1989).

It would seem to us that tribal court control over actions of officials performing searches at the sufferance of the tribal courts is another example of tribal authority which "is vital to the maintenance of tribal integrity and self-determination."

Duro went on to quote the 1975 decision in US v. Mazurie which declared, "The tribes are, to be sure, 'a good deal more than "private voluntary organizations,"' and are aptly described as 'unique aggregations possessing attributes of sovereignty over both their members and their territory.'" US v. Mazurie, 419 U.S. 544, 557 .

Even more recently in Strate v. A1 Contracting (1997), this Court noted that "Tribal authority over the activities of non-Indians on its reservation lands is an important part of tribal sovereignty" (520 US 438, 451).

Repeated decisions of this Court have made clear that jurisdiction over civil cases arising on tribal territory – regardless of whether or not the defendant is an Indian – is basic to the sovereignty that tribes exercise over their territory.

C. The claim of immunity for agents of the state violates the right of the community to participate in adjudication of local offenses.

Given the community's right to "participation" [*Williams*] in the legal process, does a claim of immunity for agents of the state in fact violate the right of the community to participate? We believe it does, at least with respect to confrontations between separate sovereignty (that is, between tribal, state and federal governments).

Application of the Sixth and Seventh Amendments to the States (via some form of incorporation doctrine of the Fourteenth Amendment) has long been problematic. Without attempting to define if and when parts of these amendments apply to States, we do not believe that a local community which is a political subdivision of a state would have any federal claim against the state for such violation of the vicinage principle. This Court's refusal to interfere in a State's location for trial seems proper.

However, the issue raised here involving a tribal government is very different from one involving a local government which is a subdivision of a state. Moreover, in the current case the

State is asking the federal courts to intervene to prevent a trial of the vicinage. If the federal courts were to deny jurisdiction to the tribal courts and thereby either prevent any trial, or move the trial into state court – rather than tribal courts – the result would be the same.

Since the purpose of the jury trial is twofold (to protect the accused and ensure community participation) intervention by the federal court to deny community participation would be no more justifiable than federal intervention to deny the right of the accused to a trial by jury. Nor do we think whether or not the community has in particular instances provided for trial by judge or by jury affects the basic principle of community participation (*Callan v Wilson* [127 U.S. 540, 553]). Even in cases tried before a judge, or are appealed to a higher level (as in the intertribal court) these mechanisms are adopted by the tribal community as its law. In short, community participation does not necessarily require trial by jury, but "community participation and shared responsibility" requires that the community has a substantial say in how civil and criminal offenses are adjudicated.

We believe that trial of government officials is even more important to be held in the vicinage than ordinary offenses against the community. As we have noted, a basic reason that the early Americans were so insistent on the vicinage rule, was that they saw it as a way to ensure that oppression could not be shielded by making officials unaccountable to the local community.

Certainly the anti-federalists who pushed for the Sixth and Seventh Amendments regarded civil suits against the government or government agents as a prime example of why trial by jury in civil suits was so important in the preservation of liberty.

Like the early proponents of the Bill of Rights, we do not think that the principle of trial of the vicinage and community participation applies less to civil trials, especially in cases where the civil suit alleges actions which may also involve criminal offenses.[3]

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[3] If, indeed, tribal governments are prohibited from bringing criminal charges against non-Indians, then the ability for tribes to address wrongs in a civil proceeding becomes all the more important.

Obviously, in some civil actions there may be a variety of jurisdictions which might take original cognizance of a suit, but to forbid that the courts of the jurisdiction where an alleged action took place to take cognizance of a suit against an individual, strikes us as very nearly adopting a modern version of the intolerable acts.

D. Sovereign Immunity does not shield individual agents from suit

Coalition for Local Sovereignty has been one of the strongest supporters of a State's Eleventh Amendment guarantee that it cannot be sued in any court without its consent. We agree that a tribal court could not hold a state liable for damages (or at least, if it found a state owed damages such payment on the part of the state would be purely voluntary). Nor do we believe that an individual tribal member could sue a state in federal court for damages.

Nevertheless, we have in past briefs argued that there is a legitimate distinction to be made between actions of state agents as individuals and actions as state agents. As we argued earlier this term in our amicus brief for *Alabama v. Garrett*:

> There is no doubt that federal courts can have cognizance of some suits involving individuals who happen to be state officers, or which claims arise from activities of state employees on the job. A police officer who steals from an individual from out of state, could certainly be sued in federal court for damages, and he could not invoke immunity. Even an officer who murders a person on orders from the governor could be sued for wrongful death if the person killed were a citizen of another state. That principle is not in dispute, nor has ever been questioned. What the *Young* case ruled on was whether the suit against Young was one against him in his individual capacity or against the State.

We have argued that in the past federal courts have played fast and loose with this *ex parte Young* distinction arguing that states both are and are not defendants in the very same action. It strikes us that the State of Nevada is now playing the same game by both shielding its agents from prosecution while also refusing to accept responsibility for their actions.

Whatever problems have arisen from the *Young* decision (which treats States as the defendant for purposes of the Fourteenth Amendment, but individuals only as defendants for purposes of the Eleventh Amendment) this court has repeatedly ruled that individual State agents could be sued in federal court without violation of State sovereignty. (In re Ayers, 123 U.S. 443; State v. Jumel, 107 U.S. 711; Antoni v. Greenhow, 107 U.S. 769; Cunningham v. Railroad Co., 109 U.S. 446; Hagood v. Southern, 117 U.S. 52; Pennoyer v. McConnaughy, 140 U.S. 1.)

It is hard to imagine how tribal prosecution of individual state agents could be more violative of state sovereignty than similar prosecution by the federal government. After all, tribal governments, unlike the federal courts, presumably have no way to force a state to comply with any of its judgements. This being the reality, it is hard to imagine how tribal courts could possibly interfere with any action of States outside of the borders of the tribe's jurisdiction.

The only penalty a tribe could enforce would be to refuse to cooperate in the future issuance of warrants on the reservation. But a judgement that once a tribal court does issue a search warrant that any actions performed by state agents from that point forward can never be reviewed or punished by the tribal court, could well lead tribes to refuse to cooperate ever again. Such a judgement by this Court that state officials are above the law of the tribe could well do irreparable damage to cooperation between state and tribal governments.

Conclusion

As distinguished Harvard law Professor Mary Ann Glendon has pointed out (most notably in her book *Right Talk: The Impoverishment of Political Discourse*) American courts in recent years have tended to interpret constitutional rights "hyper-individualisticly" and to regard individuals alone as the bearers of rights. As a result, Glendon says, "The rights revolution has contributed in its own way to the atrophy of vital local governments" (*Rights Talk*, 5) because our legal discourse of rights fails to take into account the needs (or "rights") of neighborhoods and local communities.

This Court has declared "We must not forget that the community also has rights, and that the happiness and well-being of every citizen depends on their faithful preservation." (Charles River Bridge v. Warren Bridge, 1837).

We believe it would be wrong to consider the current dispute as simply a discussion of the "right" of one individual to sue another individual. It is at root a dispute between two communities. This Court in recent years has affirmed what are often termed (improperly in our view) "States' rights." The current case is an opportunity for this Court to re-affirm that neighborhoods also have constitutional and common law rights to self-government and participation in the adjudication of disputes which arise in their community.

To again quote Professor Amar:

> A modern commentator might protest that the respect for community rights underlying the vicinage rule comes only at a cost to the rights of criminal defendants. But the Massacre trial itself provides a powerful counter-argument –for, like the Diallo defendants, most of the Massacre defendants won complete acquittals, suggesting that they received a fair trial even in a community where passions against them ran high. ... How did we come to forget these Founding lessons? Part of the answer may be found some

> fourscore years after the American Revolution, when our Constitution was reconstructed in the shadow of the Civil War. The Revolution had pitted liberty-loving localists against an oppressive imperial center; and the local jury embodied all that patriots held dear.

This Court seems to have long ago reconciled itself to the fact that the reconstruction era is long over, and distrust for local communities which was enshrined in Warren Court decisions is past. Not to mention, of course, in the current case, tribal governments have little historical record of persecuting non-Indians (rather the oppression has gone the other way).

We believe that this case presents a perfect opportunity to affirm the right of local communities and tribal governments to self-government and self-determination.

For these reasons we urge that the ruling of the Intertribal Appeals Court and the US Court of Appeals be affirmed.

Respectfully Submitted,

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